Stonewall Response: *Independent Review of the Human Rights Act*

Introduction

1. Stonewall welcomes the opportunity to respond to this review. The Human Rights Act is a crucial piece of legislation which has significantly advanced LGBT+ equality - its impact has been felt in the everyday lives of our community.

2. Stonewall is Britain's largest LGBT+ rights organisation. Over the past thirty years, we have helped secure significant advances in the rights afforded to LGBT+ people, including protections from discrimination and equal marriage. Before the introduction of the Human Rights Act, Stonewall were required to pursue a number of prominent cases in Strasbourg, due to a lack of domestic remedy. Notable cases include *Smith & Grady v United Kingdom*, and *Sutherland v United Kingdom*.

3. Prior to responding to the specific questions set out in the terms of reference of this review on the technical operation of the HRA in the courts, we would firstly like to take the opportunity to reflect on and highlight the incredible achievements of the Human Rights Act 1998 on a broader level.

4. The Human Rights Act 1998 has been fundamental in ensuring that the rights of LGBT+ people are respected and protected in the UK. In its bid to 'bring rights home' the Act has enabled LGBT+ people to meaningfully exercise their rights enshrined within the ECHR and access justice through domestic courts – providing easier redress to violations of human rights without the expense and other costs of going to Strasbourg. As stated by Baroness Hale, Former President of the Supreme Court:

> *"the Act has turned the convention rights into rights in UK law, which they were not before. They might coincide with some rights in UK law, but not expressly so [and] people had to trawl through the courts and would not necessarily get a remedy: because they did not coincide.* ***It is the Act that makes the difference****…and gives people a remedy in the UK courts."*

5. The Human Rights Act 1998 brought the power to advance equality for LGBT+ people in a manner that meaningfully impacted their everyday lives. Two prominent cases that show the situation before and after the Human Rights Act 1998 came into existence are demonstrated as follows:

6. In the case *of R v Ministry of Defence, ex parte Smith* [1996] QB 517 (commonly known as the 'gays in the military' case), the claimants had been dismissed from the armed forces because they were gay. However, their ECHR rights were not enforceable in domestic courts – meaning the applicants had to go to the European Court of Human Rights to enforce them. The European Court found the UK's practice of investigating and discharging LGBT+ personnel from the armed forces was a breach of the right to private life under Article 8. This case demonstrated the importance of Strasbourg – but it took several years for these applicants to see justice.

7. In the case of *Antonio Mendoza v Ahmad Raja Ghaidan* [2002] EWCA Civ 1533, where the Human Rights Act was now in force, the domestic courts were able to enforce the ECHR rights in order to find that domestic law (in the Rent Act 1977) was incompatible with same-sex couples' Article 8 rights and, accordingly, "read in" same-sex couples to a provision that only applied to different-sex couples.

8. Stonewall strongly recommends that the outcomes of this review do not operate to negatively impact upon the human rights framework that allows LGBT+ people to redress violations of their human rights in the domestic courts.

9. It is important to note that the UK was a founding member state of the Council of Europe and played a crucial role in the drafting of the European Convention of Human Rights. Stonewall would like to highlight our concern that this is the **third time** the Human Rights Act 1998 has been subject to a comprehensive

review and questions raised around its possible amendment or repeal. This review is connected to and will indeed further fuel the politicisation of an Act which many legal experts agree is operating *well.* Any outcomes of this review therefore run the risk of adding fuel to this fire, as well as negatively impacting the ability of victims of human rights abuses to access the Courts and indeed the ability of the UK to adhere to its human rights obligations.

10. We echo Dominic Grieve QC in that:

> "*we are now...on probably the third iteration, and the issues remain very much the same as they were previously. I will not suggest that you cannot do anything, but* ***unless you want to put the country in a very difficult position with regard to its adherence and respect for the ECHR, which the Government clearly wish to adhere to, what you can do is likely to be quite small***".

11. We therefore believe that there is no concrete 'problem' with the way in which the Human Rights Act 1998 operates, and that attempts to significantly alter its operation risks impacting the meaningful exercise of and access to fundamental human rights in the United Kingdom. Any dilution or regression of our human rights framework risks undermining the UK's place in the world as a global leader in human rights. The human rights victories we have seen since the operation of the Human Rights Act 1998 are a source of pride, including *Ghaidan v Godin-Mendoza*, which afforded same-sex couples the same protection in tenancy agreements as different-sex couples. Thanks to the vital protections of the Human Rights Act 1998, LGBT+ people in Britain have had the right to live and work freely.

12. We echo the British Institute for Human Rights in that:

> *"the Human Rights Act in its current form – the rights, duties and ways it works – should not be diluted. Rather than focus on changing the law, the Government should show human rights leadership here at home. The Government, and all of us, must focus on ensuring the rights we currently have are respected, protected and fulfilled. This means supporting people to know their rights, supporting those with legal duties to uphold rights and ensuring people's human rights are integrated into national and local policy and practice.* ***This means putting a stop to the damaging public commentary and investing in and providing the support to people to make rights real****".*

Theme One

The first theme deals with the relationship between domestic courts and the European Court of Human Rights (ECtHR). As noted in the ToR, under the HRA, domestic courts and tribunals are not bound by case law of the ECtHR, but are required by section 2 HRA to "take into account" that case law (in so far as it is relevant) when determining a question that has arisen in connection with a Convention right.

We would welcome any general views on how the relationship is currently working, including any strengths and weakness of the current approach and any recommendations for change.

13. Stonewall echoes the range of experts who state that this relationship is working *well.*

14. The ability of victims of human rights abuses to bring their cases before UK courts is an invaluable addition to our country's human rights framework. Data by the Ministry of Justice shows that the majority of human rights cases are being decided in UK Courts, and that the UK in fact now has the fewest applications taking place at Strasbourg level of all member states. UK judges can now make decisions on issues affecting the UK in a manner that is more connected to the everyday reality of our country – while Strasbourg judges, in the few cases they do consider, are reportedly now more likely to defer to the expertise of UK judges than before the Act came into operation (Lord Neuberger, oral evidence to JCHR, 2021).

15. UK judges have a duty to take into account Strasbourg jurisprudence, **but they do not have to follow it.** This has clearly been established in the development of caselaw since the Act came into operation. As such, *"while [the Human Rights Act] obliges the UK courts to "take into account" judgements of the European Court, the UK courts are not bound by them, and are free to interpret the ECHR as they see fit"* (Human Rights Watch).

16. It is plausible to suggest that this section has **previously** been interpreted in a manner which overly deferred to the Strasbourg Court (*R (Ullah) v Special Adjudicator* [2004] UKHL 26). However, in recent years UK courts have gone beyond this – there is not a practice in **modern** caselaw of UK courts treating Strasbourg caselaw as wholly binding. Gearty (2021) notes that:

> *"Since the important, early decision of the then newly formed Supreme Court in R v Horncastle [2009] UKSC 14, this has been no longer the case. The original intention of section 2, to stimulate a dialogue between the Strasbourg and the senior courts in the UK, has been achieved.* ***No change is required".***

17. Further cases demonstrate UK courts departing from Strasbourg where it is believed a case has been wrongly decided, or where it is thought that adopting Strasbourg's decision will have negative consequences for domestic law (*R (Kaiyam) v Secretary of State for Justice; R (Hicks) v Commissioner of Police of the Metropolis; Poshteh v Kensington and Chelsea; R (Hallam) v Secretary of State for Justice*).

18. As stated at an event by Public Law Project, the relationship around **judicial dialogue is working correctly** but we need to displace 'narratives of doubt' that UK Courts unduly defer to Strasbourg caselaw – there are clear examples of UK courts choosing not to follow it. Caselaw makes clear that there are instances in which courts can depart from Strasbourg jurisprudence and allows for the **margin of appreciation** to operate – there is therefore no reason why UK courts cannot domestically develop and deepen its own jurisprudence.

19. Section 2 and the operation of the Human Rights Act 1998 has also greatly benefited victims, in that "before the Human Rights Act, if UK citizens felt that the government was not respecting their rights, they had to take cases directly to the European Court of Human Rights in Strasbourg, a process that could take years. This is one clear benefit of the Human Rights Act – it has made access to justice more accessible" (Human Rights Watch).

20. The costs of taking cases directly to Strasbourg outweigh those of going through local courts in the UK, with clear benefits for both Government and victims. The process of taking cases to the ECtHR takes much longer than taking cases through the UK courts, and also requires specialist legal advice not required for the local courts process. This inevitably creates financial costs for Government and victims, but also significant emotional impact.

21. Stonewall echo the position of Human Right Consortium Scotland in that

> *"ECtHR jurisprudence strengthens and improves our human rights system – and any UK distancing from ECtHR jurisprudence could risk unhelpful divergence and reduction in rights standards for people in the UK…the ECHR is a base minimum of standards, not a ceiling – we want our human rights framework in the UK to continue to reinforce and work out those minimums making good use of ECtHR case law, so that we can ensure that we go beyond that minimum to see more human rights protected and realised for more people. Far from forcing our courts to make judgments that are out of step with the UK norm approach, our UK human rights standards are higher in several areas".*

22. This includes equal marriage – where the legal recognition of same-sex marriage by virtue of the Marriage (Same Sex) Couples Act 2013 and Marriage and Civil Partnership (Scotland) Act 2014 saw Britain take a more

progressive approach over Strasbourg's position on the right to marry. This has been particularly important given the "inconsistent and flawed approach of the European Court of Human Rights in interpretating Article 12 of the Convention in respect of same-sex marriage" (Johnson, 2021)

Theme Two

The second theme considers the impact of the HRA on the relationship between the judiciary, the executive and the legislature. The ToR note that the judiciary, the executive and the legislature each have important roles in protecting human rights in the UK. The Review will consider the way the HRA balances those roles, including whether the current approach risks "over-judicialising" public administration and draws domestic courts unduly into questions of policy.

We would welcome any general views on how the roles of the courts, Government and Parliament are balanced in the operation of the HRA, including whether courts have been drawn unduly into matters of policy. We would particularly welcome views on any strengths and weakness of the current approach and any recommendations for change.

23. Stonewall believe the current approach regarding the balance of the courts, Government and Parliament is appropriate and no reform is required. We strongly believe that parliamentary sovereignty is retained and in fact enhanced through the Act.

24. It is important to note that by attempting to interpret legislation in line with Convention rights, there is an assumption that parliament was correct in the first instance. It also gives a more effective remedy as courts can interpret in a way that respects parliament and human rights, rather than the issues that arise with incompatibility.

25. Section 3 of the Act operates to *support* rather than *undermine* parliamentary sovereignty. While courts are able to interpret provisions in line with human rights (s3(1)), s3(2) of the Act **explicitly** states that their interpretive powers cannot 'affect the validity, continuing operation or enforcement' of any primary legislation. In relation to subordinate legislation made by an Act of Parliament, this is valid so long as 'primary legislation prevents the removal of incompatibility' (s3(2)). Lastly, section 6 of the Act enables public authorities to 'to act in denial of human rights if an Act of Parliament leaves them no option but to act in this way' (Gearty, 2021).

26. The Act also **implicitly** supports parliamentary sovereignty:

> *"The assessment of what is 'possible' has been subjugated to parliamentary purpose as a matter of judicial interpretation. In the leading case of Ghadain v Godin-Mendoza [2004] UKHL 30 the majority of their lordships were clear that only a reading of the provision under scrutiny that ran with the grain of that statute's underlying purpose could be warranted under section 3(1). Anything else would be, to quote Lord Bingham in an earlier case, 'judicial vandalism': R (Anderson) v Secretary of State for the Home Department [2002] UKHL 46 at para 30. These dicta are well-known and routinely applied in the voluminous case-law on section 3 that has been generated since the 1998 Act came into force.* ***It would be possible to amend the section to make the current judicial guidance more explicit, but it is not necessary: the section is well understood as it is"*** (Gearty, 2021).

27. This was echoed by Baroness Hale when discussing judicial interpretation under the Act:

> *"I do not think it has caused a great many problems in practice. [In the case of] Ghaidan and Godin-Mendoza…four of us in the House of Lords held that, yes, it could be so interpreted, and there was one person who disagreed, but I think most people would think that that was a perfectly proper use*

of the interpretive obligation and consistent with how things are moving… That was a case in which the Government intervened to argue very strongly that that was what we should do. We have three choices. Usually the Government argues first for compatibility, but if we decide that it is incompatible, there is then a choice between the interpretive obligation, if we can, to try to cure it or simply to make a declaration of incompatibility. ***I cannot remember a case that I was involved in where we did not do whichever of those two the Government asked us to do"***

28. Stonewall wish to echo our previous point that this review is asking for answers to a problem that many experts do not believe exists.

iii. Should declarations of incompatibility (under section 4) be considered as part of the initial process of interpretation rather than as a matter of last resort, so as to enhance the role of Parliament in determining how any incompatibility should be addressed?

29. Annual Government data shows that over the course of 20 years (October 2000 – July 2020), just 43 declarations of incompatibility have been made – with 9 overturned on appeal. Within this, just 8 were corrected by remedial order, and 15 by primary or secondary legislation. This is a tiny number of cases when contrasted with the way in which the issue is framed in the political discourse.

30. A declaration of incompatibility is not binding on any part, does not affect the 'continuing operation, validity, meaning or affect' of law.

31. In the case of a declaration, **the Act triggers a power - not a duty** – for the Government to take remedial action and for Parliament to introduce primary or secondary legislation for correct the incompatibility. The Government is not obliged to address an incompatibility – although in most cases they should and would – and it remains within their remit to do nothing at all. Declarations therefore respect the constitutional role of Parliament, executive and courts. It means the courts can say 'we believe you have got it wrong' while still leaving the ultimate decision of what to do firmly within Parliament.

32. It is therefore important to note that, while Governments have generally opted to bring the law in line with declarations since the Act came into force, the legal fact remains that "it does not have to do anything, at the very least explain itself". As such, "**These provisions could be reworked to highlight the discretionary nature of the decision on whether or not to comply with declarations of incompatibility, but the wording is already arguably clear"** (Gearty, 2021).

33. Rather than be seen as adversarial, Section 3 and Section 4 enable these powers to complement and hold each other accountable in a manner that contributes to the functioning of our democracy. Judiciary decision making "should be seen as something to help better governance, not [as] an impediment to it" (Dominic Grieve, QC).

34. We echo Lord Neuberger of Abbotsbury's position that:

> *"our constitutional balance has not been interfered with by the Human Rights Act, and the notion of the declaration of incompatibility going to Parliament and Parliament deciding whether to act on it, albeit in a somewhat fast-tracked way, was a brilliant way of ensuring that the judges and courts were able to give their view, make a decision and produce an order and that only Parliament could correct or alter a statute.''*

35. In fact, there is room for criticism that the Act does not go far enough. For example, remedial orders are slow to be enforced. In the recent case of McLaughlin [2018] UKSC 30, the Supreme Court decided that 'widowed parent's allowance' giving a benefit to married but not unmarried parents violated the Convention

and therefore the judgement deemed it was incompatible. The Government upon consideration of the case decided to use a remedial order to rectify this, but this order has not yet been made and the discriminatory legislation remains in force despite this judgement taking place in 2018.

36. Should Section 3 and 4 be amended – for example by moving the declaration of incompatibility to the beginning of the process, and handing back legislation for parliament to vote on, this creates a risk of politicising the judiciary even further. It may also risk setting up longer delays in relation to drafting legislation, a matter of acute importance given the current shortage of parliamentary time.

37. We are also concerned that any reform that results in declarations being issued more frequently and not as a matter of last resort, should Parliament choose not to act, could leave UK citizens with no alternative but to go directly to Strasbourg: the very issue the Human Rights Act 1998 was designed to overcome.

Subordinate Legislation

38. Stonewall understands that criticism has emerged calling for the Human Rights Act 1998 to be amended to prevent subordinate legislation being invalidated by judges. Nevertheless, we believe that this provision of the Act does not unduly interfere with executive law-making. Rather, data shows that this process of judicial review barely interferes with executive law-making at all. Research by the Public Law Project has shown that just 14 cases had seen successful challenges to delegated legislation between 2014 – 2020, with the law being quashed or disapplied in just 4 cases. Thus, this is extremely rare (an average of 1500 – 2500 cases are processed each year).

39. It is also important to note that delegated legislation receives minimal scrutiny from parliament – judicial review by the courts is therefore essential for the functioning of our democracy. **We believe there is no need for reform in this area.**